United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

76-1033

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P/S

To be argued by
FREDERICK T. DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1033

UNITED STATES OF AMERICA,
Appellee,

—v.—

RAYMOND ROBIN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Raymond Robin appeals from a judgment of conviction entered on January 9, 1976, after a plea of guilty in the United States District Court for the Southern District of New York before the Honorable Constance Baker Motley, United States District Judge.

Indictment 74 Cr. 622, filed in three counts on June 20, 1974, charged Raymond Robin and three others—Charles Daniels, Jane Doe #1 and Jane Doe #2—with violations of the federal narcotics laws. Count One charged all the defendants with conspiring to distribute narcotics; Count Two charged all the defendants with distribution and possession with intent to distribute of approximately one-half kilogram of heroin on March 19, 1974; and Count Three charged Robin, Daniels and Jane Doe #2 with distribution and possession with intent to distribute of a further one-half kilogram of heroin on March 25, 1974.

On November 25, 1975, Robin pleaded guilty to all three counts of the indictment. On January 9, 1976, he was sentenced by Judge Motley to fifteen years in prison and a committed fine of $25,000 one each count, the sentence on Counts One and Two to run concurrently with each other and consecutively to the sentence on Count Three. The term of imprisonment is to be followed by a three year special parole term. (Tr. 59).*

Statement of Facts

On June 20, 1974, this indictment was filed in the District Court and ordered sealed. On May 1, 1975, the indictment was ordered unsealed, and on June 3, 1975, the defendant Raymond Robin was arraigned and released on bail after pleading not guilty. On November 25, 1975, Robin petitioned in the District Court to withdraw his previously entered plea of not guilty and to plead guilty to all three counts of the indictment.

The Government opposed the petition, and attempted to procure an order of *nolle prosequi* of the indictment, on the ground that Robin's attempt to plead guilty to the indictment was a ploy to preclude the possibility of imposition of heavier sanctions in the courts of New York State, where, prior to June 20, 1974, he had been indicted on the same facts underlying this indictment, and on the further ground that in his allocution the defendant would mislead the Court by understating his actual involvement in the events to which he was pleading guilty.** The Court granted Robin's motion to allow

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* Citations to "Tr." refer to pages of the official transcript.

** The Government made it explicitly clear that the dismissal of the indictment was to be with prejudice and that it would be forever barred from reindicting Robin on the same charges. (Tr. 9).

his plea of guilty and denied the Government's motion to *nolle prosequi* the indictment.

After a short break, Robin then pleaded guilty to all three counts of this indictment. In addition to propounding questions to Robin based on the specific requirements of Rule 11 of the Federal Rules of Criminal Procedure, the Court specifically asked the defendant if he understood that once his plea of guilty was accepted, the sentence that could be imposed was "greater than the State Court penalty or equal to it," to which Robin stated that he understood. (Tr. 20).

Prior to the entry of the plea, the Assistant United States Attorney again opposed its acceptance on the ground that the allocution, while it provided a factual basis for the plea, did not represent the true facts. In particular, Robin contended that his only role in the conspiracy and substantive counts was to arrange for the delivery of narcotics, for which he accepted a sum of money; the Government stated that its proof would show that in fact Robin was the actual conduit of both of the specific quantities of heroin charged in the substantive counts and, in addition, acted as a provider of heroin in an on-going conspiracy with others. (Tr. 48). The District Court accepted the plea and, at the request of the Government, remanded the defendant pending sentencing.

On January 9, 1976, after the preparation of presentence investigation report, Robin was sentenced. The sentencing commenced at 10.00 A.M. and continued, after a lunch break, into the afternoon. At the sentencing, the District Court discussed with counsel for Robin not only the pre-sentence report, but also a letter submitted by the Government on December 9, 1975, written by David Cunningham, the Assistant District Attorney principally in charge of the investigation into Robin's narcotics ac-

tivities, in which Cunningham outlined the results of that investigation. (App. 13a-19a).* In addition, Mr. Cunningham and Sterling Johnson, the Special Narcotics Prosecutor for New York County, addressed the Court and recommended, on the basis of the facts that would have been introduced had Robin proceeded to trial, that Robin be given the maximum sentence allowable under the law.

During the course of the sentencing proceeding, Judge Motley indicated that she would limit the discussion and offers of proof to statements concerning Robin's cooperation or lack thereof, and to offers of facts that would have been introduced had Robin been at trial on the indictment. (Tr. 7-8).

ARGUMENT

The Sentencing Procedure in this Case was Entirely Proper.

As Robin appears to recognize (Brief at 9), a sentence imposed within the limits provided by Congress is not subject to appellate review, in the absence of procedural irregularities. *Dorszynski* v. *United States*, 418 U.S. 424, 441 (1974); *United States* v. *Wiley*, 519 F.2d 1348, 1351 (2d Cir. 1975); *United States* v. *Tramunti*, 513 F.2d 1087, 1120 (2d Cir. 1975). In this case, the District Court imposed the maximum allowable sentence on each count, and stated explicitly that while the sentence on Counts One and Two were to run concurrently, the sentence on Count Three was to be consecutive to the term of imprisonment on the first two counts. (Tr. 59). While Robin mentions obliquely that consecu-

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* Citations to "App." refer to pages in the appellant's appendix.

tive sentences may not be imposed when "statutory interpretation" shows a contrary intent (Brief at 9), the law is clear that consecutive sentences for convictions on separate counts is permissible, even when those two counts—as is the case here—are a substantive crime and a conspiracy to commit that crime. See *Pereira* v. *United States*, 347 U.S. 1, 11 (1954); *United States* v. *Accardi*, 342 F.2d 697, 701 (2d Cir.), *cert denied*, 382 U.S. 954 (1965); *United States* v. *Quon*, 241 F.2d 161 (2d Cir. 1957), *cert. denied*, 354 U.S. 913 (1958).

Robin attempts to create an appearance of irregularity in the sentencing procedure by reciting a series of charges about the proceeding, none of which finds any substance in either the facts of this case or the law. Initially, Robin contends that it was improper for the District Court to listen to or to consider the statements made to the Court at the time of sentencing and in a letter filed with the Court a month previously. In particular, he characterizes the written and oral presentation of Mr. Cunningham, the Assistant District Attorney conducting the investigation into Robin's narcotics activities for New York State, as "hearsay."

The law is clear, however, that a Court considering the proper sentence for the defendant is not limited by the rules of evidence with respect to either the kind of information it receives or the mode of its presentation. In determining a sentence, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States* v. *Tucker*, 404 U.S. 443, 446 (1972). As this Court has had occasion to note, "[a] sentencing judge's access to information should be almost completely unfettered in order that he may 'acquire a thorough acquaintance with the character and history of the man before [him].' *United States* v. *Doyle*, 348 F.2d 715, 721 (2d Cir.),

cert. denied, 382 U.S. 843 (1965)." *United States* v. *Schipani*, 435 F.2d 26, 27 (2d Cir. 1970). In particular, a sentencing court "may and should consider matters that would not be admissible at a trial," *United States* v. *Sweig*, 454 F.2d 181, 183-184 (2d Cir. 1972), including hearsay, *Williams* v. *Oklahoma*, 358 U.S. 576 (1959); *Williams* v. *New York*, 337 U.S. 241 (1949); prior crimes of which the defendant has not been convicted, *United States* v. *Cifarelli*, 401 F.2d 512, 514 (2d Cir. 1968), *cert. denied*, 393 U.S. 987 (1969); and charges dismissed without a determination on the merits, *United States* v. *Doyle*, *supra*. See generally *United States* v. *Hendrix*, 505 F.2d 1233, 1235-36 (2d Cir. 1974). This is particularly appropriate where, as here, the conviction has been on a plea of guilty and there has been no trial from which the sentencing judge can inform himself of the facts of the case.

Thus, in considering the offer of facts that underlay the investigation leading to Robin's indictment, presented by the very officers who were responsible for that investigation, the District Court was acting properly and entirely within its discretion. Indeed, the Court emphasized the procedural regularity of the sentencing by limiting the offer of facts to those that would have been adduced at trial on this indictment and to facts concerning Robin's cooperation with investigative authorities or lack of it.* (Tr. 9). As this Court has recently reiterated,

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* Contrary to the express statement in Robin's Brief (at 17), that he has not asked for consideration of his cooperation with authorities, his lawyer, at the time of his sentence, offered certain documents concerning his cooperation, stating "I don't see how anything could be more material." (Tr. 17). It was thus incumbent on the Government to state its estimation of the extent and worth of that cooperation. Furthermore, this Court has held on a number of occasions that it is entirely proper for a sentencing court to take into account a defendant's cooperation *or lack of*

[Footnote continued on following page]

an appellate court will not go behind a statement by a District Court as to what it has or has not considered in imposing sentence. *United States* v. *Herndon*, 525 F.2d 208, 209 (2d Cir. 1975).

Furthermore, the presentation at the time of sentence by the Assistant United States Attorney in charge of this case and by the state authorities was entirely proper. This Court has held that a "prosecutor has a duty to reveal matters to the court which are relevant to proper sentence whether or not favorable to the defendant." *United States* v. *Pfingst*, 477 F.2d 177, 191 (2d Cir. 1973). Indeed, that portion of Robin's brief concerning his claim that the Government was somehow unfair at the time of sentence (Brief at 14-18), falls far wide of the mark. Much of this part of the brief concerns Robin's views of the Government's position that it should have been allowed to seek a *nolle prosequi* of the indictment.

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cooperation with the Government. *United States* v. *Sweig, supra; United States* v. *Vermeulen*, 436 F.2d 72, 76-77 (2d Cir. 1970); *United States* v. *Sclafani*, 487 F.2d 245, 252 (2d Cir. 1973).

Robin's further claim that the sentencing judge relied on "inaccurate information" (Brief at 10), is belied by the proceedings in the District Court. Of the four items of "inaccurate information" claimed by Robin, two—the letter filed by Assistant District Attorney Cunningham and the statement of Special Prosecutor Sterling Johnson—consist of the Government's statement of what it would have proved had there been a trial. Robin contested the statements, and was given complete latitude to personally explain his version of the facts. (Tr. at 51-55). The value of Robin's house was similarly explored in depth with Robin (Tr. 55-57), and at any rate, could hardly have been an important consideration in imposing sentence. Finally, Robin's dissatisfaction with the statement of the District Court that one "who is not an addict and possessed or was able to possess a half kilo of heroin was a major dealer" misses the point, since the statement was not one of fact as to which there can be disagreement but one of judgment, as to which the District Judge was acting fully within her power.

Since Robin prevailed on that issue in the District Court, it is clearly irrelevant on this appeal. Moreover, the Government is under no obligation to be "impartially objective on the issue of sentence," as Robin claims. (Brief at 18). While attorneys for the Government owe a special duty of fairness and care both to the Court and to society, *Berger* v. *United States*, 295 U.S. 78, 88 (1935), the Government is nonetheless an adversary whose "'*raison d'être* [is] to punish criminal behavior." *United States* v. *Mallah*, 503 F.2d 971, 989 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975). The presentation of the Government, while forceful, was well within bounds permitted an advocate in a criminal proceeding.*

Robin's final point—that the District Court omitted "key considerations" in imposing sentence—is frivolous. The only factual claim made in the brief is that the sentencing judge made no mention of the "effect of the sentence on appellant's health and family." (Brief at 18). Any judge imposing sentence is obviously aware that both the health and the family of the defendant may be adversely affected by the service of any sentence. More-

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* Relying upon this Court's decision in *United States* v. *Rosner*, 485 F.2d 1213 (2d Cir. 1973), Robin appears to argue that he was not given an opportunity to confront the allegations contained in the Government's written submissions. This claim is frivolous. The letter written by Assistant District Attorney Cunningham was made available to Robin prior to sentencing, and his lawyer was given and exercised the opportunity to give the "verbal explanation or comment" required by the *Rosner* decision. *Id.* at 1230. Robin fails to note with respect to the *Rosner* opinion that this Court in no way disapproved the content or the presentation of the memorandum filed by the Government on the issue of Rosner's sentence—a memorandum similar in scope and subject matter to the Cunningham letter in this case. See *id.* at 1231 n. 27. Rather, the Court ruled simply that the sentencing judge had been over-hasty in imposing sentence without affording the defendant a chance to reply. See also *United States* v. *Malcolm*, 432 F.2d 809 (2d Cir. 1970).

over, Robin's attorney specifically brought these matters to Judge Motley's attention. (Tr. 11). It is thus clear that in this portion of Robin's brief his real claim is that this Court should determine *de novo* the appropriateness of the sentence imposed in this case. As both the Supreme Court and this Court have repeatedly held, however, the choice of proper sentence is one conferred solely to the discretion of the District Court. *Dorszynski* v. *United States*, *supra*; *United States* v. *Wiley*, *supra*; *United States* v. *Tramunti*, *supra*. As Robin conceded at the time of the entry of his guilty plea (Tr. 30), his intent in pleading guilty to the federal indictment was to preclude the possibility of imposition of a heavy sentence in the state courts. Although the sentence he actually received in the federal court perhaps now causes him to regret that choice, dissatisfaction with the sentence is not a recognizable ground for attacking it.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

State of New York)
: ss.:
County of New York)

Frederick T. Davis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 9 day of April, 1976, he served ~~a copy~~ two copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Joseph I. Stone Esq.
277 Broadway
New York N.Y. 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this

9 day of April, 1976

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977